PAULA BRADY, LETA K. JIM, and PATRICIA STEVENS, Appellants	:	Order Vacating Decision and Remanding Case
v.	:	Docket No. IBIA 96-68-A
ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	April 29, 1997

This is an appeal from an April 17, 1996, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning a November 1, 1995, recall election held by the Elko Band (Band) of the Te-Moak Tribe of Western Shoshone Indians of Nevada (Tribe). 1/ For the reasons discussed below, the Board vacates the Area Director's decision and remands this matter to him for further proceedings.

The Tribe, which has three constituent Bands, is organized under a Constitution adopted on August 17, 1982, and approved by the Deputy Assistant Secretary - Indian Affairs (Operations) on August 26, 1982. Article 4 of the Constitution vests executive and legislative powers in a Tribal Council and in Band Councils, one for each Band. The Tribal Council consists of representatives selected by the Band Councils from among Band Council members. Art. 4, sec. 2(a). Band Council members are elected by the members of the respective Bands. Art. 4, sec. 11(a).

Appellants were members of the Elko Band Council. In addition, Appellants Brady and Jim were members of the Tribal Council, having been selected for membership under Art. 4, sec. 2(a). Petitions to recall Appellants from office as Band Council members were presented to Band Chairman Raymond Gonzales on October 14, 1995. Chairman Gonzales called a special meeting of the Band Council for October 23, 1995, at which time it was determined that the petitions were valid. At another meeting held on October 26, 1995, a recall election was scheduled for November 1, 1995. Resolution No. 95-EC-15, Oct. 26, 1995. 2/

At the November 1, 1995, recall election, Appellants were recalled from office))Brady by a vote of 60 to 37, Jim by a vote of 58 to 39, and Stevens by a vote of 57 to 40.

1/ An earlier appeal filed by these same appellants was dismissed as premature on Feb. 29, 1996, because the Area Director had not yet issued a decision in the matter. 29 IBIA 107.
2/ This resolution states, inter alia, that it "confirms the special meeting that was held on October 23, 1995."

By Resolution No. 95-EC-16, enacted on November 9, 1995, the Band Council recognized the results of the November 1, 1995, recall election and scheduled a special election for December 20, 1995, to fill the three vacancies.

Appellants apparently sought review of the recall election by the Tribal Council. Tribal Vice-Chairman Charles Malotte called a meeting of the Tribal Council for November 7, 1995. At that meeting, the Tribal Council declared the recall petitions null and void. According to minutes of the November 7, 1995, meeting, 3/ Appellants Brady and Jim participated in the meeting as Tribal Council members but did not vote on the question concerning the recall petitions.

Apparently both Band Chairman Gonzales and Tribal Vice-Chairman Malotte wrote to the Superintendent, Eastern Nevada Agency, BIA, and/or an attorney in the Office of the Field Solicitor, Salt Lake City, concerning the recall election. 4/

The Superintendent also sought the views of the Field Solicitor. On November 20, 1995, the Field Solicitor responded, stating in part:

> It is our understanding that valid petitions for recall were received by the Elko Band Council, and an election was held in which three Elko Band Council members were recalled by the Band membership. The Vice Chairperson of the Te-Moak Tribal Council then overturned the election for recall by the Elko Band. You have requested our opinion regarding the authority of the Vice Chairperson of the Te-Moak Tribal Council to interfere in a Band Council recall election. We believe that the Te-Moak Tribal Council does not have such authority, and the actions of the Tribal Council are contrary to the Tribe's Constitution. We believe that the Te-Moak Tribal Council has no authority over Band Council recall elections unless the Band Council fails or refuses to act within thirty (30) days of its receipt of a valid petition for recall. See Article 4, Section 18. [5/] We understand, however, that the Elko Band Council did act in accordance with the Tribe's Constitution, and the Te-Moak Tribal Council had no authority to interfere with the recall election of the Elko Band.

3/ These minutes were submitted by Janet Hyeoma, Tribal Recording Secretary, in Appellants' earlier appeal.

4/ Only Malotte's letter, dated Nov. 9, 1995, is included in the record. His letter, which referred to an earlier letter from Gonzales, was addressed to the Solicitor's Office attorney and specifically requested a legal opinion.

5/ Art. 4, sec. 18, provides:

"Refusal of Band Council to Act on Recall. If any Band Council shall fail or refuse to act within thirty (30) days of its receipt of a valid petition for recall, the petitioners may bring the matter to the Tribal Council which shall act in place of the Band Council in the manner outlined in Section 17 of this Article."

The Superintendent transmitted the Field Solicitor's opinion to Tribal Chairman Felix Ike. His November 21, 1995, transmittal letter stated in part:

> You are aware that the Constitution of [the Tribe] constitutes a political agreement between the Tribe and the United States government. This agreement spells out how the tribe will conduct business with the federal government as well as other entities. If the agreement is violated in any manner it could impact the delivery of federal services and dollars to the tribe.
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> Since the Te-Moak Council, as pointed out in the opinion, does not have the authority to overturn the Elko Band Council's action (recall) the Eastern Nevada Agency does recognize the recall action. In turn, any action taken by the Te-Moak Tribal Council after November 1, 1995 (recall election) where the recalled individuals from Elko Band participated, cannot be recognized by the Agency.
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> The recourse for the recalled individuals lies within the Band, as pointed out in [an Acting Superintendent's] letter of December 1, 1994, internal disputes can be handled through the use of tribal forums which could include tribal courts, if authorized, or tribal councils or mediators, or elections, and the current situation you have to substitute the band for tribe. In this case the Elko Band Council has, by Resolution No. 95-EC-16, scheduled an election for December 20, 1995, which is the remedy or forum to resolve this dispute.
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> In arriving at this opinion the Field Solicitor's Office reviewed the Constitution of [the Tribe] and [Vice-Chairman Malotte's] letter dated November 9, 1995, and rejected the charges in that letter because of the above stated opinion, Te-Moak lacked constitutional authority to intervene.

The Band's special election took place as scheduled on December 20, 1995. William J. Woods, Deborah K. Mendez, and Kaylynn McQueen were elected as Band Council members at that election. On December 21, 1995, the Band Council removed Brady and Jim from their positions as Band representatives on the Tribal Council, Resolution No. 95-EC-18, [6/] and selected the three newly elected individuals to serve on the Tribal Council. Resolution No. 95-EC-17.

Also on December 21, 1995, the Tribal Council enacted Resolution No. 95-TM-30, declaring the November 7, 1995, Tribal Council meeting unconstitutional and further declaring all actions taken at that meeting null and void. 7/

6/ The Superintendent evidently believed, when he wrote his Nov. 21, 1995, letter, that Brady and Jim had already been removed from the Tribal Council.
7/ As noted above, the Nov. 7, 1995, meeting was the meeting at which the Tribal Council had found the Band's recall election invalid.

In the meantime, appellants had appealed the Superintendent's November 21, 1995, letter to the Area Director. The Area Director affirmed the Superintendent's letter on April 17, 1996, stating:

> As you may be aware, in 1978 the Supreme Court decision in Santa Clara Pueblo v. Martinez, 436 U.S. 49, found that internal tribal disputes had to be resolved in tribal court or in another tribal forum established to address such disputes. The current provisions of the Code of Federal Regulations are in accord with the Santa Clara Pueblo decision. 25 C.F.R. § 11.104(b) specifically prohibits a C.F.R. court from adjudicating "an election dispute" or "any internal tribal government dispute" without the consent of the tribal governing body. In this case, the Te-Moak Tribal Council has not consented to resolution of "election dispute" or "any internal tribal government dispute" in the C.F.R. court. Accordingly, such disputes must be resolved by whatever means the tribe has at its disposal for the resolution of internal tribal disagreements.
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> Indian tribes and the United States have a government-to-government relationship. In order to maintain this relationship, the BIA is occasionally forced to recognize which faction claiming powers within a tribe, or which contestant in an election dispute, the BIA recognizes as the legitimate governing body or tribal official. That recognition, however, lasts only "as long as the dispute remains unresolved by a tribal court [or other tribal forum]." Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983). See also, Wis. Winnebago Business Committee v. Koberstein, 636 F. Supp. 814 (W.D. Wis. 1986); Runs After v. United States, 766 F.2d 347 (8th Cir. 1985); Nero v. Cherokee Nation, 892 F.2d 1457 (10th Cir. 1989). [Bracketed material in original.]
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> In this matter, the Field Solicitor's interpretation on the tribal constitution was the advice given to the Superintendent in order for him to make a decision as to which tribal faction he was to recognize until the election dispute was resolved. The election dispute was resolved by the calling and conducting of the December 20, 1995 special band election. Therefore, with the results of that election, the Superintendent made his decision to recognize the three newly-elected council members as part of the Elko Band Council.

On appeal to the Board, Appellants contend that, on several occasions in the past, the Tribal Council has overturned Band recall elections, thus establishing precedent for resolution of Band recall disputes in the Tribal Council. They further contend that BIA has previously recognized the authority of the Tribe to resolve its own disputes but is now attempting to interfere with the tribal dispute-resolution process.

In support of their argument, Appellants furnish a copy of an order denying a motion for preliminary injunction in Ike v. U.S. Department of the Interior, No. CV-R-81-293-ECR (D. Nev. Mar. 10, 1982), 9 Indian L. Rep. 3043. Appellants contend that this order dealt with a situation similar to the present one.

Ike concerned the recall of two individuals from the Tribal Council. The Superintendent recognized the results of the recall. However, the Area Director vacated the Superintendent's decision, stating that the matter was one to be resolved in a tribal forum. After an unsuccessful administrative appeal of the Area Director's decision, the plaintiffs in Ike, including the two recalled individuals, sought an injunction in Federal district court which would, inter alia, require that BIA recognize the recalled individuals as members of the Tribal Council. In its December 10, 1982, order, the district court declined to issue the requested injunction. Instead, it stayed proceedings to allow for exhaustion of tribal remedies. The court stated:

> It does not appear that plaintiffs have sought a remedy in a tribal court. Admittedly, the two named defendants herein are not subject to the jurisdiction of a tribal court. However, Leta Jim and Neva Stevens [8/] are. In light of the BIA's representations that an appropriate tribal forum should decide who are to serve as members of the council, it would seem that the Court of Indian Offenses [(C.F.R. court)] of [the Tribe] is an appropriate forum. It has exercised jurisdiction over tribal election matters before. See Holley v. Malotte, No. EC-CV-005-81, decided December 22, 1980. [9/] Only where the plaintiffs' efforts to obtain a tribal remedy have demonstrated that no such remedy is available should a federal court exercise jurisdiction. * * *
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> In light of the BIA's expressed position, the dispute now really is between two factions of the [Tribe]. It is an intra-tribal matter that should be resolved within the tribe. [Citations omitted.]

9 Indian L. Rep. at 3044. 10/

This case resembles Ike in that, in both cases, the Superintendent acted quickly to issue a decision in the tribal dispute, arguably without allowing the Tribe to complete its own dispute-resolution process. As the Area Director and the district court both recognized in Ike, internal tribal disputes should be resolved within the Tribe. See also, e.g., Wadena v. Acting Minneapolis Area Director, 30 IBIA 130 (1996); Bucktooth v. Acting Eastern Area Director, 29 IBIA 144 (1996), and cases cited therein.

8/ These two individuals had been appointed to replace the recalled Tribal Council members.

9/ Since 1993, the regulations governing C.F.R. courts have precluded C.F.R. courts from adjudicating tribal election disputes or internal tribal government disputes unless authorized to do so by the tribe's governing body. 25 C.F.R. § 11.104(b).

According to the Area Director's Apr. 17, 1996, decision, the Tribe has not authorized its C.F.R. court to adjudicate election disputes.

10/ Although the district court retained jurisdiction over the matter and presumably entered a final order at a later date, no copy of such an order is presently before the Board. Nor is there anything before the Board which shows the ultimate tribal resolution of the dispute.

In this case, not only did the Superintendent issue an arguably premature decision, but the Superintendent and the Field Solicitor undertook to interpret the Tribe's Constitution without, apparently, considering whether the Tribe had arrived at an interpretation of its own. It is well established that a tribe has the primary authority to interpret its own constitution and that BIA must defer to a reasonable interpretation put forth by the tribe. E.g., Wadena; LaRocque v. Aberdeen Area Director, 29 IBIA 201 (1996); San Manuel Band of Mission Indians v. Sacramento Area Director, 27 IBIA 204 (1995). If Appellants' allegations here are correct, the Tribal Council has previously acted to invalidate Band elections, suggesting at least the possibility that the Tribe has interpreted its Constitution and/or laws to authorize the Tribal Council to act as a forum for the resolution of Band election disputes. 11/ Nothing in the record shows that the Superintendent or the Field Solicitor allowed the tribal disputants to make a showing as to the Tribe's interpretation of tribal law in this regard.

A review of the Constitution alone might lead to the conclusion that the Tribal Council cannot serve as a forum for the resolution of election disputes because it is given neither specific authority in this regard nor general judicial powers. Instead, judicial powers are vested, by Article 8 of the Constitution, in a "court of general jurisdiction and a Supreme Court of appellate jurisdiction." Despite the provisions of Article 8, however, there is evidently no tribal court in existence at the present time. Given the disparity between the structure of the Tribe's government as contemplated in the Constitution and the structure that exists in fact, there is clearly a need for a tribal interpretation of the Constitution with respect to the proper forum for resolution of election disputes.

The Board finds that the Area Director erred in interpreting the Tribe's Constitution to preclude the Tribal Council from serving as a forum for the resolution of Band recall election disputes, without first attempting to learn the Tribe's interpretation of its Constitution in this regard.

While rejecting the possibility that the Tribal Council could serve as a forum for the resolution of this dispute, the Superintendent and the Area Director both found that the December 20, 1995, special election was such a forum. Yet there is nothing in the record to suggest that the Tribe has designated such special elections as forums for the resolution of disputes arising from preceding recall elections. Further, it is difficult to see how the December 20, 1995, special election could have resolved the question of the validity of the recall election. If the recall election was invalid, it would appear that the special election simply compounded the problem. 12/

11/ In at least one instance, BIA has apparently recognized the authority of the Tribal Council to invalidate Band elections. See Acting Superintendent's Dec. 1, 1994, Letter, discussed further infra, nn. 12 and 13. The Dec. 1, 1994, letter concerned regular Band elections, rather than recall elections.
12/ The Acting Superintendent's Dec. 1, 1994, letter discussed a Tribal Council action which invalidated regular Band elections (held on Oct. 24,

The Board therefore finds that the Area Director erred in concluding that the December 20, 1995, special election constituted a resolution of the dispute concerning the validity of the November 1, 1995, recall election.

The Board agrees with the Area Director's decision in one important respect. The Area Director correctly states that BIA must sometimes, in the course of carrying out the government-to-government relationship, recognize one or the other of competing tribal governments pending the resolution of election disputes in a tribal forum. In addition to the cases cited by the Area Director, see, e.g., Wadena, supra; LaRocque, supra.

While correctly stating this principle, the Area Director did not stop at recognizing the newly elected Band Council members on a temporary basis, pending resolution of disputes in a tribal forum, but went on to conclude that a tribal resolution of the dispute had been reached. As discussed above, the Board has found this conclusion erroneous.

Because of the two errors discussed above, the Board finds that the Area Director's decision must be vacated. Upon remand of this matter, the Area Director's first task is to attempt to learn, from the Tribe, what the Tribe's procedures for resolving Band election disputes are.

In this regard, the Tribe's election ordinance should be helpful. 13/ The Tribe has apparently included some dispute-resolution procedures in this ordinance and perhaps has established or designated a forum to hear disputes.

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fn. 12 (continued)
1994, by all three Bands) and rescheduled new elections for a later date. The Acting Superintendent noted that "the Tribe has taken the necessary steps of resolving its internal disputes by rescheduling the Band Elections."

It is possible that the Superintendent in this case believed that the situation here was analogous to the one discussed in the Dec. 1, 1994, letter. Clearly it is not analogous, however. In the 1994 instance, the Tribal Council can be seen as resolving election disputes by starting over, i.e., by substituting new elections for the disputed ones. In this case, the Dec. 20, 1995, special election did not substitute for the disputed Nov. 1, 1995, recall election. Rather, it assumed the validity of the recall election.

13/ There are several references to this ordinance in the record, although no copy has been provided to the Board, either by BIA or by Appellants. The Board presumes that this is the ordinance required by Art. 7, sec. 8, of the Constitution, which directs the Tribal Council to enact an election ordinance including provisions for, inter alia, "settling election disputes." Art. 7, sec. 8(e).

According to the Acting Superintendent's Dec. 1, 1994, letter, "[t]he Tribe has its own process and timeframes for resolving election disputes according to its Election Ordinance."

There is no discussion of the ordinance in the Field Solicitor's Nov. 20, 1995, opinion or in the decisions of either the Superintendent or the Area Director. It does not appear, therefore, that the ordinance was considered by these officials.

Although BIA clearly has a need for information concerning the Tribe's dispute-resolution procedures, the responsibility for providing a forum rests with the Tribe. There are some hints in the record here that the Tribe may have abdicated its responsibility in this regard, seeking instead to force BIA to act as a forum. The Board hopes that this is not the case. 14/

If, however, it turns out that the Tribe has not established or designated a forum for resolution of election disputes, BIA should offer assistance to the Tribe in establishing such a forum. If a permanent forum cannot be established promptly, the Tribe might wish to consider, for the immediate purpose of resolving this dispute, either vesting jurisdiction over this dispute in the C.F.R. court or acquiring the temporary services of a tribal judge, perhaps an experienced judge from another tribe.

Pending final tribal resolution of this dispute, BIA may well need to recognize a Band Council on a temporary basis. Here again, BIA should be guided by the Tribe's law, if any, concerning the status of elections pending final resolution of disputes. If no guidance is available from tribal law, BIA may reasonably recognize a certification of election results by a properly constituted and authorized tribal body, on a temporary basis, pending final resolution of this dispute by the Tribe. Gonzales v. Acting Albuquerque Area Director, 28 IBIA 229 (1995).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's April 17, 1996, decision is vacated, and this matter is remanded to him for further proceedings as discussed above.

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge

14/ Neither the Tribal Council nor the Band Council has participated in this appeal, although both have been on the Board's distribution list since the appeal was filed, and Appellants have served them with copies of their pleadings. Accordingly, the Board has not had the benefit of any information from the Tribe concerning its election dispute procedures.